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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. BRIAN LEE DONALDSON, Defendant and Appellant.	F075916 (Super. Ct. Nos. BF167392A, BF166043A, BF166044A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. H. A. Staley, Judge.*

Erin J. Radekin, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and R. Todd Marshall, Deputy Attorneys General, for Plaintiff and Respondent.

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*Retired Judge of the Kern Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

INTRODUCTION

Defendant Brian Lee Donaldson pled guilty to various charges and enhancements in Kern Superior Court case Nos. BF166043A and BF166044A.[1] In August 2015, the court sentenced defendant in case No. BF166043A to two years for felony possession of methamphetamine for sale, enhanced by an additional three years for a Health and Safety Code former section 11370.2, subdivision (c) enhancement. (Undesignated statutory references are to the Health and Safety Code.) It imposed a concurrent term of 16 months for a violation of Penal Code section 496, subdivision (a) for receiving stolen property. That same day, the court sentenced defendant in case No. BF166044A to eight months for felony possession of methamphetamine for sale, to run consecutively with defendant's sentence in case No. BF166043A. The court imposed a "split sentence" pursuant to Penal Code section 1170, subdivision (h)(5), ordering defendant to serve two years of the five-year eight-month aggregate term in the county jail, then one year in a substance abuse treatment program immediately upon release from the county jail, and the remaining two years eight months on mandatory supervision pursuant to Penal Code section 1170, subdivision (h).

In May 2017, a jury convicted defendant of a separate violation of section 11378, possession of methamphetamine for sale (count 1) and misdemeanor possession of methamphetamine (count 2) in case No. BF167392A. Defendant admitted he had suffered two prior convictions within the meaning of former section 11370.2, and the court dismissed two separate prior conviction allegations pursuant to former section 11370.2, subdivision (c), and two prison prior allegations.

In June 2017, the court sentenced defendant in case No. BF167392A to two years on count 1 plus three years for each of the two former section 11370.2, subdivision (c)

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[1]These cases were previously numbered 2014038211 and 2014006902, respectively, before they were transferred from Ventura County to Kern County and renumbered pursuant to Penal Code section 1203.9. We refer to them by their Kern County case numbers.

enhancements, for a total term of eight years—four to be served in county jail and four to be served on mandatory supervision. The court also sentenced defendant to 90 days on count 2 and stayed that sentence pursuant to Penal Code section 654.

That same day, the court revoked mandatory supervision in case No. BF166043A and reinstated the original five-year term, three years to be served in county jail and the remainder on mandatory supervision. The court also revoked mandatory supervision in case No. BF166044A and reinstated the original eight-month term to be served on mandatory supervision. The court ordered the terms in case Nos. BF166043A and BF166044A to run consecutive to each other but concurrent to the sentence in case No. BF167392A.

In this consolidated appeal, defendant argues the former section 11370.2, subdivision (c) enhancements imposed in case Nos. BF166043A and BF167392A must be stricken in light of Senate Bill No. 180 (2017–2018 Reg. Sess.) (Senate Bill 180), which narrowed the scope of section 11370.2, subdivision (c) to apply only to prior convictions for narcotics sales involving a minor in violation of section 11380.

We conclude defendant is entitled to retroactive application of Senate Bill 180 in case No. BF167392A and remand for a full resentencing hearing in that case. However, we conclude judgment in case No. BF166043A became final before Senate Bill 180 went into effect. Thus, defendant is not entitled to retroactive application of Senate Bill 180 in that case. Accordingly, in all other respects, we affirm the judgments.

FACTUAL BACKGROUND

June 2015 plea to April 2015 charges (Case No. BF166043A)

In April 2015, defendant was charged by information in count 1 with a violation of section 11378, possession of methamphetamine for sale, a felony, and in count 2 with a violation of Penal Code section 496, subdivision (a), receiving stolen property, a felony. It was further alleged as to each count that defendant had committed the offenses while out on bail in another case within the meaning of Penal Code section 12022.1,

subdivision (b); and with respect to count 1, that he had a prior conviction of section 11378 within the meaning of former section 11370.2, subdivision (c). Defendant pled guilty to both counts and the related enhancements on June 5, 2015.

June 2015 plea to May 2014 charges (Case No. BF166044A)

In May 2014, defendant was charged in counts 1 and 2 with violations of section 11378, possession of methamphetamine for sale, felonies (case No. BF166044A). It was further alleged as to each count that defendant had a prior conviction of section 11378 within the meaning of former section 11370.2, subdivision (c), and defendant was ineligible for probation because of the same prior conviction within the meaning of Penal Code section 1203.07, subdivision (a)(11).

On June 5, 2015, defendant pled guilty to count 1 and admitted the allegations he had a prior drug sales conviction within the meaning of former section 11370.2, subdivision (c) and was ineligible for probation because of the prior conviction pursuant to Penal Code section 1203.7.

August 2015 sentencing hearing (Case Nos. BF166043A and BF166044A)

The court held a sentencing hearing on multiple matters involving defendant on August 27, 2015 including case Nos. BF166043A and BF166044A and multiple misdemeanor cases. In case No. BF166043A, the court sentenced defendant to the midterm of two years on count 1 (possession of methamphetamine for sale), enhanced by an additional three years for the former section 11370.2, subdivision (c) enhancement. On count 2 (receiving stolen property), the court sentenced defendant to the low term of 16 months, to run concurrently with his sentence on count 1. The court struck the Penal Code section 12022.1, subdivision (b) out-on-bail enhancement allegation.

In case No. BF166044A the court sentenced defendant to eight months (one-third the midterm) on count 1 (possession of methamphetamine for sale) pursuant to Penal Code section 1170, subdivision (h), to run consecutively with defendant's sentence in

case No. BF166043A. The court struck the former section 11370.2, subdivision (c) prior conviction enhancement.

The court imposed a "split sentence," ordering defendant to serve two years of the aggregate term of five years eight months in the county jail, then one year in a substance abuse treatment program immediately upon release from the county jail, and the remaining two years eight months on mandatory supervision pursuant to Penal Code section 1170, subdivision (h).

The court informed defendant "the sentences that I just imposed, all of them are subject to appeal. You have the right to appeal these matters. If you want to do that, though, you have to do that within 30 days of today's date. You have to provide notice of your intention to appeal." Defendant confirmed he understood his appellate rights.

On January 25, 2016, defendant admitted violating his mandatory supervision by failing to complete the substance abuse treatment program. The court ordered defendant to serve the one year he was to serve in the treatment program in county jail.

May 2017 jury trial on March 2017 charges (Case No. BF167392A) and revocation of mandatory supervision on previous charges

In March 2017, defendant was charged in count 1 with a violation of section 11378, possession of methamphetamine for sale, a felony, and in count 2 with a misdemeanor violation of section 11377, possession of methamphetamine (case No. BF167392A). It was further alleged as to count 1 that defendant had suffered three prior convictions of former section 11378 within the meaning of section 11370.2, subdivision (c), and that defendant had served two prior prison terms within the meaning of Penal Code section 667.5, subdivision (b). As a result of the new charges, the court was notified defendant was in violation of the terms of his mandatory supervision in case No. BF166043A.

Jury trial commenced in case No. BF167392A on May 24, 2017. Two days later, defendant admitted he had suffered two prior convictions within the meaning of section

11370.2, and the court dismissed the remaining prior conviction allegations pursuant to section 11370.2, subdivision (c) and the prison prior allegations.

The jury convicted defendant of the charges. On June 29, 2017, the court denied probation and sentenced defendant to two years on count 1 plus three years for each of the two section 11370.2, subdivision (c) enhancements, for a total term of eight years: four years to be served in custody and four years to be served on mandatory supervision. The court also sentenced defendant to 90 days on count 2 and stayed that sentence pursuant to Penal Code section 654. Defendant filed a notice of appeal that same day.

Also on June 29, 2017, the court revoked mandatory supervision in case No. BF166043A and reinstated the original five-year term, three years to be served in county jail and the remaining two years on mandatory supervision. The court also revoked mandatory supervision in case No. BF166044A and reinstated the original eight-month term with no modification, to be served on mandatory supervision. The court ordered the terms in case Nos. BF166043A and BF166044A to run consecutive to each other but concurrent to the sentence in case No. BF167392A. Our court ordered these cases to be consolidated for purposes of appeal.

DISCUSSION

I. Senate Bill 180

Former section 11370.2, subdivision (c) provided for three-year sentence enhancements for many drug-related prior convictions. (Stats. 1998, ch. 936, § 1, eff. Sept. 28, 1998.) Effective January 1, 2018, Senate Bill 180 narrowed the scope of section 11370.2, subdivision (c), eliminating the three-year enhancements for drug-related prior convictions except where the prior conviction was for narcotics sales involving a minor in violation of section 11380, an exception not applicable to defendant's case. (Stats. 2017, ch. 677, § 1, eff. Jan. 1, 2018; see § 11370.2.)

II. The Section 11370.2, Subdivision (c) Enhancements Imposed in Case No. BF167392A Must Be Stricken in Light of Senate Bill 180 and the Matter Remanded for Resentencing

Defendant first argues the section 11370.2, subdivision (c) enhancements imposed in case No. BF167392A must be stricken and the matter remanded for resentencing because Senate Bill 180 became effective before judgment in that case became final. The People concede Senate Bill 180 applies retroactively to case No. BF167392A under *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*), and the matter should be remanded for resentencing with instructions the section 11370.2 enhancements must be stricken. They note, upon remand, the trial court has jurisdiction to modify every aspect of defendant's sentence on the counts that are affirmed and that Proposition 47, the Safe Neighborhoods and Schools Act, does not require that a defendant's total sentence be shortened.

Under *Estrada*, "where [an] amendatory statute mitigates punishment and there is no saving clause, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed" if the amended statute takes effect before the judgment of conviction becomes final. (*Estrada*, *supra*, 63 Cal.2d at p. 748; see *id.* at p. 744.) "The *Estrada* rule rests on the presumption that, in the absence of a savings clause providing only prospective relief or other clear intention concerning any retroactive effect, 'a legislative body ordinarily intends for ameliorative changes to the criminal law to extend as broadly as possible, distinguishing only as necessary between sentences that are final and sentences that are not.'" (*People v. Buycks* (2018) 5 Cal.5th 857, 881–882, quoting *People v. Conley* (2016) 63 Cal.4th 646, 657.) "'The rule in *Estrada* has been applied to statutes governing penalty enhancements, as well as to statutes governing substantive offenses.'" (*People v. Buycks*, *supra*, at p. 882, quoting *People v. Nasalga* (1996) 12 Cal.4th 784, 792.)

Senate Bill 180 contains no statement regarding retroactivity, and its amendment to section 11370.2 was an ameliorative change in the law. Thus, we agree with the parties that it applies retroactively to nonfinal judgments under *Estrada*.

Here, defendant filed a timely notice of appeal in case No. BF167392A and his appeal was pending when Senate Bill 180 was enacted and took effect. Accordingly, defendant may seek the benefit of Senate Bill 180 because judgment in that case is not yet final—it has not yet reached final disposition in the highest court authorized to review it. Thus, he is entitled to remand in case No. BF167392A and to have the related section 11370.2 enhancements imposed in that case stricken. However, we further agree with the People, upon remand, "'a full resentencing as to all counts is appropriate, so the trial court can exercise its sentencing discretion in light of the changed circumstances.'" (*People v. Buycks, supra*, 5 Cal.5th at p. 893.)

III. The Judgment in Case No. BF166043A Is Final so Defendant Is Not Entitled to Remand

Defendant next argues the sentence enhancements imposed pursuant to former section 11370.2, subdivision (c) in case No. BF166043A must also be stricken because judgment is not yet final and *Estrada* principles apply to permit him to seek the benefit of Senate Bill 180. He notes, though the court sentenced him in August 2015, because the court retained discretion to modify the original sentence, judgment is not yet final.

He further argues a certificate of probable cause is not necessary to challenge his sentence or, if one is deemed necessary, he should be permitted to seek one in the interest of justice. The People argue defendant is not entitled to any relief in case Nos. BF166043A and BF166044A because these cases were final for *Estrada* purposes 60 days after the court imposed the split sentence in August 2015. Furthermore, defendant's failure to obtain a certificate of probable cause precludes challenges to the validity of his plea. Alternatively, they contend any remand would subject defendant's plea bargain to reapproval or rejection by the court pursuant to Penal Code section 1192.5. We agree with the People—judgment in case Nos. BF166043A and BF166044A became final for *Estrada* purposes 60 days after the court imposed the split sentence in

August 2015; thus, defendant is not entitled to remand to seek relief pursuant to Senate Bill 180 in these cases.

The Supreme Court recently reiterated the principle that a sentence is generally considered the judgment in a criminal case. (See *People v. McKenzie* (2020) 9 Cal.5th 40, 46 (*McKenzie*) ["In criminal actions, the terms 'judgment' and "'sentence'" are generally considered 'synonymous' [citation], and there is no 'judgment of conviction' without a sentence [citation]"].) In *McKenzie*, the defendant pleaded guilty to numerous drug-related offenses in 2014 and admitted having sustained four prior felony drug-related convictions for purposes of sentence enhancement under Health and Safety Code, former section 11370.2. (*McKenzie*, *supra*, at p. 43.) As here, at the time of the defendant's plea, each prior conviction rendered the defendant subject to a consecutive three-year prison term enhancement. (*Ibid*.) The trial court suspended imposition of sentence as to all the charges, granted the defendant five years' probation, and ordered him to attend drug court. (*Ibid*.) In 2016, the court revoked the defendant's probation and imposed a prison sentence. (*Ibid*.) While the defendant's appeal from the revocation order was pending, Senate Bill 180 was enacted and went into effect. (*Ibid*.) The defendant then sought the benefit of the amendments to Health and Safety Code section 11370.2 on appeal. (*Ibid*.) The prosecution argued, because the defendant failed to appeal from the order granting probation in 2014, he could not benefit from ameliorative amendments that took effect after the time for taking an appeal from that order lapsed. (*McKenzie*, at p. 46.)

On appeal, our court rejected the People's position and, in holding the defendant was entitled to seek the benefit of Senate Bill 180, we explained the distinction between when a trial court grants probation and suspends judgment versus when it grants probation and imposes a sentence but suspends its execution:

> "… These two situations affect when the judgment becomes final, which in turn affects whether a defendant is eligible to seek the retroactive

> benefit of a change in law. [¶] In the first situation, when the trial court initially suspends *imposition* of sentence and grants probation, 'no judgment is then pending against the probationer, who is subject only to the terms and conditions of the probation.' (*People v. Howard* (1997) 16 Cal.4th 1081, 1087 (*Howard*).) No judgment has been rendered against him, or ever will be if he successfully completes probation. But if he fails to successfully complete probation and instead violates probation, the trial court may revoke and terminate probation, and then impose sentence in its discretion, thereby rendering judgment. (Pen. Code, § 1203.2, subd. (c); *Howard*, *supra*, at p. 1087.) That judgment will become final if the defendant does not appeal within 60 days. (See Cal. Rules of Court, rule 8.308(a).)
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> "In the second situation, when the trial court initially imposes sentence, but suspends *execution* of that sentence and grants probation, a judgment has been rendered. (*People v. Mora* (2013) 214 Cal.App.4th 1477, 1482 [imposition of a sentence is equated with entry of a final judgment, even if its execution is suspended and the defendant is placed on probation].) That judgment will become final if the defendant does not appeal within 60 days. (*People v. Ramirez* (2008) 159 Cal.App.4th 1412, 1420–1421; see rule 8.308(a).) If the defendant violates probation, the trial court may revoke and terminate probation, but it must then order execution of the originally imposed sentence; the trial court has no jurisdiction to do anything other than order the exact sentence into execution. (Pen. Code, § 1203.2, subd. (c); *Howard*, *supra*, 16 Cal.4th at pp. 1087–1088; *People v. Martinez* (2015) 240 Cal.App.4th 1006, 1017.)" (*People v. McKenzie* (2018) 25 Cal.App.5th 1207, 1214, fn. omitted, review granted Nov. 20, 2018, S251333, sub. opn. *McKenzie*, *supra*, 9 Cal.5th 40.)

The Supreme Court affirmed our conclusion that when a convicted defendant is placed on probation with imposition of sentence suspended, the judgment of conviction is not final because it has not yet reached final disposition in the highest court authorized to review it and there is no "'judgment of conviction' without a sentence." (*McKenzie*, *supra*, 9 Cal.5th at p. 46.) Accordingly, the defendant could seek the benefit of the ameliorative legislation in his appeal from the revocation of his probation and imposition of sentence. (*Ibid*.)

Unlike in *McKenzie* where imposition of judgment was suspended, here, in August 2015, the court imposed a split sentence in case Nos. BF166043A and BF166044A

pursuant to Penal Code section 1170, subdivision (h)(5), meaning the sentence was to be served "partly in county jail and partly under the mandatory supervision of the county probation officer."[2] (*People v. Scott*, *supra*, 58 Cal.4th at pp. 1418–1419.) The imposition of the split sentence represented a judgment for purposes of determining finality. (See *People v. Mora*, *supra*, 214 Cal.App.4th at p. 1482 ["The imposition of the sentence is equated with entry of a final judgment"].)

Thus, this case represents circumstances more similar to the second situation described by our court in *McKenzie*, "when the trial court initially imposes sentence, but suspends *execution* of that sentence and grants probation," meaning that "a judgment has been rendered." (*People v. McKenzie*, *supra*, 25 Cal.App.5th at p. 1214.) Under these circumstances, because the trial court rendered judgment when it imposed the split term on August 27, 2015, and nothing in the record suggests defendant appealed, the judgment became final 60 days later, well before Senate Bill 180 took effect. (See Pen. Code, § 1237 [appeal may be taken from a final judgment and a sentence is a final judgment for purposes of this section]; Cal. Rule of Court 8.308 [notice of appeal must be filed within 60 days of rendition of judgment].) Accordingly, the amendments to section 11370.2 contained in Senate Bill 180 do not apply to his sentence. (See *People v. Howard*, *supra*, 16 Cal.4th at p. 1095 [when a trial court imposes sentence, suspends execution, and places the defendant on probation, the sentence imposed when defendant was placed on probation becomes final if not appealed from, and cannot be altered if probation is subsequently terminated; defendant "did not contest the validity of the sentence the court imposed when granting probation. No good reason exists for allowing her to do so once the court revoked her probation"].)

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[2]In 2011, the Legislature enacted the Criminal Justice Realignment Act of 2011, under which certain "low-level felony offenders … no longer serve their sentences in state prison" but instead "serve their sentences either entirely in county jail or partly in county jail and partly under the mandatory supervision of the county probation officer." (*People v. Scott* (2014) 58 Cal.4th 1415, 1418–1419.)

Defendant challenges this conclusion, arguing his sentence was not final when the court announced the split sentence because the trial court retained the authority to revoke, modify, or terminate his mandatory supervision pursuant to Penal Code sections 1170, subdivision (h), 1203.2, subdivisions (a) and (b), and 1203.3. He contends the Fourth Appellate District's opinion in *People v. Camp* (2015) 233 Cal.App.4th 461 (*Camp*) establishes his sentence was not yet final because it could still be modified by the trial court.

In *Camp*, the People challenged the trial court's decision to terminate the mandatory supervision portion of the defendant's split sentence early and modify his sentence to release him to the custody of the Immigration and Customs Enforcement Agency for deportation. (*Camp*, *supra*, 233 Cal.App.4th at p. 464.) They argued the trial court lacked "'authority to substantially modify the original judgment after it ha[d] been imposed and executed.'" (*Id*. at p. 470.) The *Camp* court rejected the People's argument and held, under Penal Code section 1170, subdivision (h)(5)(B), a trial court may terminate a defendant's mandatory supervision early without ordering the defendant to serve the suspended portion of the sentence. (*Id*. at pp. 464, 474.) It further noted, "neither [Penal Code] former section 1170, subdivision (h)(5)(B)(i), nor subdivisions (a) and (b) of [Penal Code] section 1203.2 or section 1203.3 contains any language that would suggest that a court's power to terminate mandatory supervision is restricted in any manner." (*Id*. at p. 474.)

Camp does not change our conclusion. None of the provisions of the Penal Code discussed in *Camp* authorize a court to modify a sentence previously imposed by striking an enhancement. (See Couzens & Bigelow, Felony Sentencing After Realignment (May 2017) p. 16; <http://www.courts.ca.gov/partners/documents/felony_sentencing.pdf> [as of July 16, 2020] [noting to the extent Pen. Code, §§ 1170, 1203.2 and 1203.3 "reserve jurisdiction to adjust the circumstances of release, such authority undoubtedly does not include the right to change the length of the original sentence. Once made, that is a

sentencing decision that cannot be changed unless the court has the authority to recall the sentence under authority similar to section 1170(d)"].) Accordingly, even if a trial court has authority to terminate mandatory supervision without ordering that the suspended portion of the sentence be served, as *Camp* held, it does not follow that a split sentence is therefore not a final judgment under *Estrada*. Indeed, an unappealed order of probation suspending execution of the sentence is final after 60 days, yet such orders are still subject to modification under Penal Code sections 1203.2 and 1203.3, the same statutes governing the modification of orders imposing split sentences. (See *People v. Howard*, *supra*, 16 Cal.4th at p. 1084.)

We conclude cases Nos. BF166043A and BF166044A were final before Senate Bill 180 took effect. Accordingly, the trial court is without authority to strike the section 11370.2, subdivision (c) enhancements imposed in case No. BF166043A. Thus, defendant is not entitled to remand on this basis.

DISPOSITION

Case No. BF167392A is remanded with directions to the trial court to strike the section 11370.2, subdivision (c) enhancements and to hold a full resentencing hearing in that case. The judgments in cases Nos. BF166043A and BF166044A are affirmed.

PEÑA, J.

WE CONCUR:

POOCHIGIAN, Acting P.J.

DESANTOS, J.